

# THE STATE OF NEW HAMPSHIRE

## SUPREME COURT

**In Case No. 2006-0925, In the Matter of Kathleen J. Russo and Thomas A. Garside, the court on September 18, 2007, issued the following order:**

The petitioner's motion to dismiss the appeal is denied. The respondent, Thomas A. Garside, appeals an order of the Derry Family Division modifying his child support obligation and finding him in contempt of a prior support order. He argues that the trial court erred by: (1) defaulting him for failing to respond to discovery requests; (2) calculating child support solely upon an imputed income amount and without allowing a credit for support to other minor children; and (3) calculating his arrearage. We affirm in part, vacate in part, and remand.

The trial court has broad discretion to modify child support orders, and to fashion appropriate remedies for the violation of a discovery obligation. We will not disturb the trial court's rulings upon such matters absent an unsustainable exercise of discretion. See In the Matter of State & Taylor, 153 N.H. 700, 702 (2006); Bursey v. Bursey, 145 N.H. 283, 286 (2000). In modifying support, the trial court is to adhere strictly to the child support guidelines unless it finds that special circumstances merit a deviation. See RSA 458-C:4, :5 (Supp. 2006).

The respondent was ordered to pay support for the parties' one child in 1997. The respondent is also the father of children from a prior marriage. The petitioner filed a petition to modify the support obligation, and a hearing on the petition was scheduled for October 10, 2006.

On August 8, 2006, the petitioner served interrogatories and requests for production of documents, seeking detailed information regarding the respondent's finances. Although the parties dispute their respective levels of cooperation regarding the discovery, there is no dispute that the respondent, who at the time was pro se, failed to timely answer it, and on September 11, 2006, the petitioner filed motions to compel and for the entry of conditional default. The trial court entered conditional default on September 13, 2006.

On September 20, 2006, the petitioner filed a motion for contempt, claiming that the respondent had not paid support since February 1, 2006, and requested that the issue be joined at the October 10, 2006 hearing. On September 27, 2006, the petitioner moved for final default, and filed a motion in limine seeking to preclude the respondent from offering evidence at the hearing that would have been responsive to the discovery. The trial court granted the motion to compel on September 28, 2006, ordering answers by October 3, 2006.

The respondent did not answer the discovery by October 3. On Thursday, October 5, he telephoned the petitioner's counsel and asked if he could deliver his responses the following day after business hours. She declined, noting that her office would be closed at that time and on the following Monday. The petitioner's counsel then asked him to disclose his current salary. He responded that it was \$294,000, an amount consistent with his tax filings. The petitioner's counsel claims he also said that this was the same amount he earned in 1997.

On October 10, the respondent brought to the hearing three boxes containing his discovery responses and a financial affidavit. The petitioner declined the trial court's invitation to have her review the documents and, if necessary, reschedule the hearing, instead requesting that the trial court proceed on the basis of the statements the respondent had allegedly made during the telephone conversation. The trial court did so, finding that the respondent earned \$294,000 in 1997, and imputing annual increases of 5% per year. The trial court also granted the motion in limine, and refused to accept testimony from the respondent that he was, in fact, current on his child support.

Accordingly, the court granted the petition to modify, applying the child support guidelines to an imputed annual income of \$426,300, and failing to account for support obligations to the respondent's other children. The trial court also granted the motion for contempt, calculating the respondent's arrearage upon the basis of the 1997 order from February 1, 2006, until June 18, 2006, and upon the modified amount thereafter. The record does not indicate that the trial court requested financial affidavits from the parties, or that the parties submitted affidavits prior to the hearing.

We address first the respondent's argument that the trial court erred by defaulting him, and by not allowing him to present evidence at the final hearing that would have been responsive to the discovery requests. Contrary to the respondent's assertion, the trial court did not default him. Rather, the trial court found the motion for final default to be moot. Under the circumstances, we conclude that the conditional default was moot as well.

The trial court did, nevertheless, grant the petitioner's motion to compel, and the respondent neither challenges that order nor disputes that he failed to comply with it. Thus, it was within the trial court's discretion to preclude the introduction of evidence at the final hearing that would have been responsive to the discovery, and upon this record, we cannot conclude that the trial court's granting of such relief was unsustainable. See Bursey, 145 N.H. at 286. Accordingly, we reject the respondent's claim that the trial court erred by finding him in contempt of the 1997 support order because his testimony, which the trial court properly precluded, would allegedly have established that he was current on child support.

We agree with the respondent, however, that the trial court unsustainably exercised its discretion to the extent it calculated the respondent's income solely upon his alleged telephone statement to the petitioner's counsel. While the trial court has considerable discretion regarding child support, it "must have all information relevant to that determination before exercising that discretion." In the Matter of Rohdenburg & Rohdenburg, 149 N.H. 276, 279 (2003). Both parties had an obligation independent of the petitioner's discovery requests to complete and submit financial affidavits in advance of the final hearing, see Fam. Div. R. 13, and neither the parties nor the court may waive compliance with this requirement, see Rohdenburg, 149 N.H. at 278.

The record in this case does not reveal that either party submitted financial affidavits prior to the hearing, although the petitioner did submit an affidavit at its conclusion. Nor does the record indicate that the trial court requested financial affidavits of the parties. Under the facts unique to this case, we conclude that it was unsustainable to modify the respondent's support to an amount based solely upon the petitioner's representation of a telephone conversation with the respondent, and in the absence of his financial affidavit.

Finally, we reject the respondent's argument that the trial court erred by calculating arrearage to include child support amounts prior to the date the petitioner moved for contempt. Should the trial court, upon remand, grant the petition to modify, the modification may be made effective as of the date the respondent received notice of the petition to modify. See RSA 458-C:7, II (2004).

We vacate the trial court's order only to the extent it granted the petition to modify, and remand for further proceedings consistent with this order. Otherwise, the trial court's order is affirmed.

Affirmed in part; vacated in part; remanded.

BRODERICK, C.J., and DUGGAN and HICKS, JJ., concurred.

**Eileen Fox,  
Clerk**